Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-60

NATIONAL RAILROAD PASSENGER CORPORATION,
Petitioner

v.

ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. McARTHUR, Trustees of the Property of PENN CENTRAL TRANSPORTATION COMPANY, Debtor,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

		Page
I	Opinions Below	1
II	Jurisdiction	3
III	Statutes and Constitutional Provisions Involved	3
IV	Counterstatement of Questions Presented for Review	3
V	Counterstatement of the Case	4
VI	Reasons for Denying the Writ	10
	A. The Decision Of The Seventh Circuit Holding The Indiana Court Was Without Jurisdiction By Declaratory Judgment To Circumscribe The Jurisdiction Of The Reorganization Court Is Consistent With The Decisions Of Other Courts Of Appeal And Of This Court	10
	B. The Case Does Not Present An Important Question of Federal Law	14
VII	Conclusion and Request for Relief	14
VIII	Certificate of Service	15
	Appendix A—Decision of the United States Court of Appeals for the Third Circuit in *In re Penn Central Transportation Company*, No. 76-2542 (3d Cir. July 25, 1977)	A1

TABLE OF CITATIONS

Cases:	Page
Baker v. Gold Seal Liquors, Inc., 417 U.S. 467 (1974)	10
Donovan v. City of Dallas, 377 U.S. 408 (1964)	11
In re New York, N.H. & H. R.R., 457 F.2d 683 (2d Cir.), *cert. denied*, 409 U.S. 890 (1972)	10
In re Penn Central Transportation Co., No. 76-2542 (3d Cir. July 25, 1977)	2, 7, 11
In re Penn Central Transportation Co., 431 F. Supp. 671 (E.D. Pa. 1977)	8
In re Penn Central Transportation Co., 422 F. Supp. 67 (E.D. Pa. 1976)	2, 8
Jennings v. Boenning & Co., 482 F.2d 1128 (3d Cir.), *cert. denied*, 414 U.S. 1025 (1973)	12
Kalb v. Feuerstein, 308 U.S. 433 (1940)	10
Kline v. Burke Construction Co., 260 U.S. 226 (1922)	12
Local 1078, International Union U.A., A. & A.I.W. v. Anaconda American Brass Co., 256 F. Supp. 686 (D. Conn. 1966)	13
National R.R. Passenger Corporation v. Blanchette, No. IP76-274-C (S.D. Ind. June 25, 1976)	2
New Haven Inclusion Cases, 399 U.S. 392 (1970)	10
Office of Supply, Republic of Korea v. New York Navigation Co., 469 F.2d 377 (2d Cir. 1972)	13
Timken Co. v. Local 1123, United Steelworkers, 482 F.2d 1012 (6th Cir. 1973)	13
Statutes:	
Bankruptcy Act, Section 77, 11 U.S.C. § 205	10
Federal Arbitration Act, Section 10, 9 U.S.C. §§ 1-14	6, 13
Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. §§ 701-794	2
28 U.S.C. § 1254(1)	3
Other:	
U.S. Constitution, Article I, Section 8, Clause 4	3

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v.

ROBERT W. BLANCHETTE, RICHARD C. BOND AND JOHN H. McARTHUR, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORATION COMPANY, DEBTOR,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit (Seventh Circuit) for which re-

view is sought is reported at 551 F.2d 127 (7th Cir. 1977) and is printed in the National Railroad Passenger Corporation's (Amtrak) Petition for Certiorari (Petition or Pet.) as Appendix A beginning at page 65. The Seventh Circuit reversed the decision (in the form of a Declaratory Judgment) of the United States District Court for the Southern District of Indiana, Indianapolis Division (Indiana Court) in Cause No. IP76-274-C against the Respondents, Robert W. Blanchette, Richard C. Bond and John H. McArthur, Trustees of the Property of Penn Central Transportation Company, Debtor (Penn Central or Trustees). The Declaratory Judgment of the Indiana Court is not reported, but is printed as Appendix B of the Petition beginning at page 81. *National R.R. Passenger Corporation v. Blanchette,* No. IP76-274-C (S.D. Ind. June 25, 1976).

Also of concern is the decision of the United States District Court for the Eastern District of Pennsylvania (Reorganization Court) which is supervising the reorganization of Penn Central, holding that an Arbitration Award against the Trustees could not be enforced because of the functioning of the Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. §§ 701-794 (Rail Act or RRRA). The decision of the Reorganization Court is reported in *In re Penn Central Transportation Co.*, 422 F. Supp. 67 (E.D. Pa. 1976), and is printed as Appendix D of the Petition beginning at page 109 (Enforcement Proceeding). The decision in the Enforcement Proceeding was appealed to the United States Court of Appeals for the Third Circuit (Third Circuit). The Third Circuit's opinion, filed on July 25, 1977, is not reported but is printed as Appendix A of this Brief. *In re Penn Central Transportation Co.*, No. 76-2542 (3d Cir. July 25, 1977) (Amtrak appeal).

II
JURISDICTION

This Court has jurisdiction to review the decision of the Seventh Circuit by 28 U.S.C. § 1254(1).

III
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Petition (pp. 5-12) describes the statutes and constitutional provisions involved in the Petition but does not include Article I, Section 8, Clause 4 of the Constitution which provides: "The Congress shall have power . . . to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

IV
COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Seventh Circuit correctly hold that the Indiana Court was without jurisdiction, by Declaratory Judgment or other judicial means, to circumscribe the jurisdiction of the Reorganization Court as to the enforcement of a confirmed Arbitration Award against the Trustees?

2. Did the Seventh Circuit correctly hold that the Indiana Court erred in finding that *res judicata* barred the Trustees from contending in the Enforcement Proceeding before the Reorganization Court that the functioning of the Rail Act prevented the enforcement of the confirmed Arbitration Award against them?

V

COUNTERSTATEMENT OF THE CASE

The facts as set forth in the Petition (Pet. 12-32), while extraordinarily prolix, are generally correct. Several significant aspects of the facts are, however, ignored.

When the basic agreement between Amtrak and the Trustees, which included arbitration provisions to resolve disputes arising from interpretations of the contract, discussed in Fact I of the Petition (Pet. 18-19), was submitted for approval, the Reorganization Court in Order No. 238 only authorized the Trustees to enter into the agreement upon the condition that all arbitration awards would be submitted to that court "for review and approval before becoming finally binding upon the Trustees or the Debtor during the pendency of these reorganization proceedings." This condition became a part of the agreement binding both Amtrak and the Trustees. Amtrak recognized the condition by submitting the dispute over the maintenance of the Chicago-Indianapolis tracks to arbitration. While the Reorganization Court was willing to relinquish its plenary jurisdiction to permit factual disputes and interpretations of the basic agreement to be resolved by arbitration, it specifically reserved for itself the exclusive right to determine how and to what extent any arbitration award should be enforced against the Trustees. (Pet. 113-17).

The discussion of the Arbitration Award in Fact 3 of the Petition (Pet. 14, 22) does not include anything regarding the limited scope of the arbitration proceeding or of the Award. The principal hearing before the Arbitration Panel began in September of 1975 and concluded in January of 1976. (Pet. 93). At this hearing, Amtrak asserted two most significant positions. First, it disclaimed

all relief based on damages and insisted that it was entitled to specific performance by the Trustees of their unfulfilled maintenance obligations with respect to the Chicago-Indianapolis tracks. (Pet. 91-92). Second, although the Rail Act had been passed, and under the Final System Plan implementing the Act, the Chicago-Indianapolis tracks were to be conveyed to the Consolidated Rail Corporation (Conrail) early in 1976, Amtrak demanded that the impact of the Rail Act upon the Trustees' executory obligation was not before the Arbitration Panel for determination.[1] On February 3, 1976, two months before the conveyance of Penn Central's properties to Conrail, the Arbitration Panel in Case No. 11 (Pet. 91-108) made its Award. Both positions of Amtrak were accepted. After finding that the Trustees had not satisfied their obligation to maintain the Chicago-Indianapolis tracks, the Panel ordered "only that specific performance be performed" (Pet. 95-97), and prescribed an elaborate maintenance program to be carried out by the Trustees beginning on May 3, 1976 and continuing until January 1, 1978. (Pet. 98-99). Significantly, the program was not to be undertaken until after the tracks were conveyed to Conrail on April 1, 1976 pursuant to the Rail Act. The Arbitration Panel also accepted Amtrak's second position that the Rail Act question was not before it in the arbitration proceedings and therefore was not decided, saying:

> Article Six of the Basic Agreement limits the authority of the Panel to "the interpretation, application, or implementation of this Agreement," and Section 4.5 of the Arbitration Agreement requires that the Panel "be governed by the provisions and language of the applicable basic Agreement or Agreements." Accordingly, the Panel does not consider that

1. Transcript of Arbitration Proceeding at 157.

it is the proper body to decide whether, or to what extent, the Regional Rail Reorganization Act of 1973 or the Final System Plan thereunder may affect the carrying out of this award. (Pet. 98-99).

In sum, the arbitration proceedings resulted in an award finding that the Trustees had not done what the contract required, and ordered them to do so in the future. How this might be done, in view of the then almost immediate conveyance mandated by the Rail Act, was left to the courts to determine, the logical forum being the Reorganization Court which, by Order No. 238, had retained jurisdiction to determine how, and to what extent, all arbitration awards under the Amtrak agreement should be enforced against the Trustees.[2]

In the discussion of Fact 4, the Confirmation Judgment, at pages 14 and 23 of the Petition, there is again an important omission. Believing that the jurisdiction of the Indiana Court to set aside an Arbitration Award in the Confirmation Proceeding was strictly limited by Section 10 of the Federal Arbitration Act, 9 U.S.C. §§ 1-14, (Pet. 5, 6) to situations where the arbitrators had acted wrongfully or capriciously, and believing that the Rail Act issue was exclusively within the jurisdiction of the Reorganization Court to decide, the Trustees did not raise

2. At page 39 of its Petition, Amtrak says:

> The majority of the National Arbitration Panel who fashioned the arbitration award . . . concluded their award by noting their uncertainty as to the law and their belief that the effect, if any, of the Rail Act upon the Award was a matter for the confirming court and not the arbitrators.

That statement is simply not true, as demonstrated by the above quotation from the Arbitration Award. The Arbitration Panel at no time stated that the law as a result of the Rail Act was uncertain nor did it say or indicate that the effect of the Rail Act was a matter for the confirming court. What the Panel did say was that its function was limited to interpreting the agreement and that it was not the proper forum to decide the Rail Act question.

the Rail Act issue either orally or in writing in the Confirmation Proceeding. The Rail Act issue and its effect upon the Arbitration Award has only been submitted by the Trustees for decision to the Reorganization Court in the Enforcement Proceeding. That limited issue was briefed by both the Trustees and Amtrak, was heard by the Court and resolved in favor of the Trustees. (Pet. 29-30). Amtrak appealed the decision to the Third Circuit. On July 25, 1977 the Third Circuit affirmed the Order of the Reorganization Court. *In re Penn Central Transportation Co.*, No. 76-2542 (3d Cir. July 25, 1977).

Fact 8—The discussion of the Reorganization Court decision (Pet. 16, 32) does not correctly describe what the Reorganization Court did. Amtrak asserts that the Reorganization Court said "that the Rail Act and the conveyance of the tracks to ConRail, in effect, relieved Penn Central of all responsibility for its defaults under the Basic Agreement, even though the defaults occurred before the conveyance to ConRail" (Pet. 16) and further asserts that the "confirmation judgment . . . of the Indiana court [was] reviewed by the reorganization court and declared [a nullity]." (Pet. 30). Both assertions are unmindful of what the Reorganization Court actually decided. What the court did decide was the limited question of whether the Arbitration Award which called for specific performance could be enforced against the Trustees in view of the fact that the tracks upon which the maintenance was to be performed over an eighteen-month period were no longer in the Trustees' ownership, having been conveyed to Conrail pursuant to Congressional mandate (Pet. 120; Appendix A to this Brief at A2-A3).[3]

The Reorganization Court did not declare the Confirmation Judgment to be a nullity as Amtrak contends.

3. On December 17, 1976, as a supplement to their Plan of Reorganization now pending before the Reorganization Court, the

Rather, full recognition was given to the Judgment with respect to the issues it had decided:

> The judgment confirming the award is a final judgment, and is entitled to be given *res judicata* effect in these proceedings. No one has ever contended otherwise. In short, it is now finally settled that the Trustees had not fully complied with their obligation to maintain the trackage involved, and that Amtrak was entitled to have the situation speedily remedied. But the impact of the Rail Act upon effectuation of the award was clearly left open for later determination elsewhere. (Pet. 118).

---

3. (Cont'd.)
Trustees petitioned the court for authority to compromise unpaid real estate and corporate taxes. Amtrak objected to the compromise proposal on the ground that the Plan of Reorganization gave no recognition to Amtrak's asserted administrative claims based upon the Arbitration Award here of concern. The Reorganization Court, on April 22, 1977, in Part V of Memorandum and Order No. 2921 and 2922 approving the tax compromise program, said this about Amtrak's claim:

> Amtrak presented to this Court a petition for enforcement of an award made by an arbitration panel, which determined that, during the period before conveyance of the rail system to ConRail, the Trustees had failed to maintain certain passenger track [referring to Chicago-Indianapolis tracks] at the level of utility required by the contract between the Trustees and Amtrak. The relief sought was in the nature of specific performance: an order requiring the Trustees to perform certain engineering services and to plan for, and thereafter carry out, certain large-scale track restoration. I denied Amtrak's request because the conveyance of the railroad to ConRail pursuant to the RRRA rendered performance of track maintenance by the Trustees a legal and practical impossibility. *See* In re Penn Central Trans. Co. (Petition of Amtrak to Enforce Arbitration Award), 422 F. Supp. 67 (E.D. Pa. 1976).
>
> Although I had no occasion at that time to decide whether Amtrak had a claim for damages, I did point to some possible obstacles to the successful assertion of any such claim: . . . By reiterating these potential infirmities, I do not mean to preclude Amtrak from asserting any claim it may feel is justified.

In re Penn Central Transportation Co., 431 F. Supp. 671, 682-83 (E.D. Pa. 1977).

With respect to the Declaratory Judgment of the Indiana Court which held that *res judicata* prevents the Reorganization Court or any other court from considering the effect of the Rail Act upon the Arbitration Award, the Reorganization Court concluded that it was not bound by it. (Pet. 118-119). The correctness of this conclusion was confirmed by the decision of the Seventh Circuit.

The Petition notes in passing that the decision of the Reorganization Court was appealed to the Third Circuit and was awaiting decision. In that appeal, Amtrak submitted as issues for decision (1) whether the Reorganization Court was required by the doctrine of *res judicata*—as pronounced by the Declaratory Judgment of the Indiana Court—to disregard and ignore the effect of the Rail Act in determining whether the Arbitration Award should be enforced against the Trustees, and (2) whether the decision of the Reorganization Court regarding the enforceability of the confirmed Arbitration Award was correct. The Third Circuit in its recent decision has ruled against Amtrak on both issues. (Appendix A to this Brief at A1-A24).

VI

REASONS FOR DENYING THE WRIT

A. The Decision Of The Seventh Circuit Holding The Indiana Court Was Without Jurisdiction By Declaratory Judgment To Circumscribe The Jurisdiction Of The Reorganization Court Is Consistent With The Decisions Of Other Courts Of Appeal And Of This Court

The Seventh Circuit held that the Declaratory Judgment of the Indiana Court was an attempt to prevent the Reorganization Court from considering the effect of the Rail Act by declaring that the Indiana Court's earlier Confirmation Judgment had *res judicata* effect and that this effort, if authorized, would usurp the jurisdiction and function of the Reorganization Court. This decision of the Seventh Circuit does not conflict with the decisions of other courts of appeal or of this Court.

There is unanimity among the decisions of the courts of appeals and of this Court that the exclusive jurisdiction to determine how judgments or rulings of other courts are to be enforced against trustees of a railroad in reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. § 205, rests in the reorganization court. *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 477 (1974) (Stewart, J., concurring); *New Haven Inclusion Cases*, 399 U.S. 392, 426, 428-29 (1970); *Kalb v. Feuerstein*, 308 U.S. 433, 439-40 (1940); *In re New York, N.H. & H. R.R.*, 457 F.2d 683, 688-89 (2d Cir.), *cert. denied*, 409 U.S. 890 (1972).

It is implicit in the holding of the Seventh Circuit that if the Reorganization Court did not give proper recognition to the Confirmation Judgment, Amtrak should seek relief in the appropriate court of appeals, in this instance the Third Circuit. Amtrak sought such relief from the

holding of the Reorganization Court that the Confirmation Judgment did not bar the Trustees from raising the Rail Act issue in the Enforcement Proceeding. The Third Circuit in its recent decision on the Amtrak appeal says that the Seventh Circuit's decision "now represents the law of the case as far as the June 25 declaratory judgment [of the Indiana Court] is concerned." (Appendix A to this Brief, at A19 n.14), and that:

> We agree with Judge Hastings' holding that "the Indiana Court was without jurisdiction by declaratory judgment, or other judicial means, to circumscribe the jurisdiction of the Pennsylvania Reorganization Court as to the enforcement of an arbitration award which was subsequently confirmed by the Indiana Court, and we now so hold." *Blanchette, supra* at 135. *In re Penn Central Transportation Co.*, No. 76-2542 (3d Cir. July 25, 1977) (Appendix A to this Brief at A21-A22).

The Seventh Circuit decision vacating the Declaratory Judgment as an improper attempt to interfere with the jurisdiction of the Reorganization Court was plainly right and consistent with decisions regarding the role of the federal courts in reorganization proceedings—including the very recent decision of the Third Circuit on the same issue. Accordingly, there is no need for review by this Court.

The Seventh Circuit went further than merely holding the Declaratory Judgment was beyond the jurisdiction of the Indiana Court, which would have been decisive, and considered the question of whether the Declaratory Judgment was correct on the merits. Relying on decisions of this Court, and principally upon *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964), the Seventh Circuit held that *res judicata* is a doctrine to be utilized by a second court to prevent the relitigation of factual issues earlier decided by another court.

The Seventh Circuit said it was unable to find any precedent to support the proposition that a court, having rendered a judgment can later by a declaratory judgment, hold that its earlier judgment is *res judicata* so as to prevent another forum from entertaining litigation involving the same parties. (Pet. 78). The Seventh Circuit added that Amtrak had cited no precedent to support the position of the Indiana Court and it is appropriate to say that Amtrak has cited no such precedents in its Petition to this Court. *Res judicata* is a doctrine that can be used by a second court to prevent issues already litigated by the same parties in another forum from being relitigated before it. As this Court said in *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922):

> Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. *Id.* at 230.[4]

The Seventh Circuit not only concluded that the Indiana Court's application of the doctrine of *res judicata* was unprecedented and an improper effort to control the proceedings in the Reorganization Court, but also found

4. Jennings v. Boenning & Co., 482 F.2d 1128, 1135 (3d Cir.), *cert. denied*, 414 U.S. 1025 (1973), quoting *Kline*, said that: "'[T]he effect of that judgment [referring to an earlier judgment of another forum] is to be determined by the application of the principles of *res adjudicata* by the court in which the action is still pending [the second forum] in the orderly exercise of its jurisdiction. . . .'"

that the Indiana Court erred in holding the Rail Act issue was in fact *res judicata*. (Pet. 78).

Noting that the Rail Act issue had not been raised in the Confirmation Proceeding, since it had been excluded from the arbitration hearings and Award, the Seventh Circuit concluded that it was not a proper issue to be raised in that proceeding (Pet. 78) because of the limited review of arbitration awards provided by Section 10 of the Federal Arbitration Act (Pet. 5-6). The decisions are clear that the review provided by Section 10 is limited to the integrity of the arbitration proceedings and is not available to resolve questions which were excluded from the arbitration. *See Office of Supply, Republic of Korea v. New York Navigation Co.*, 469 F.2d 377, 379-80 (2d Cir. 1972); *Local 1078, International Union U.A., A. & A.I.W. v. Anaconda American Brass Co.*, 256 F. Supp. 686, 688 (D. Conn. 1966); *see also Timken Co. v. Local 1123, United Steelworkers*, 482 F.2d 1012 (6th Cir. 1973). Since the language of Section 10 of the Federal Arbitration Act is unequivocal and the cases interpreting it without ambiguity, the need for review by this Court of this relatively simple area of the law is not present.

The Reorganization Court, prior to the Seventh Circuit's decision, had reached the identical conclusion that while the judgment confirming the Arbitration Award was *res judicata* on the issues resolved by the Award, *i.e.*, that the Trustees had not fulfilled the maintenance obligations required by the basic Amtrak Agreement with respect to the Chicago-Indianapolis tracks, it was not *res judicata* on the Rail Act issue, saying:

> In the first place, I cannot understand how an arbitrators' award which expressly left certain issues open for later determination by other tribunals can, by a confirmation judgment expressly limited to the

terms of the award, be deemed to have resolved those very issues. In the second place, I do not believe that issues of such magnitude and potential importance to the future of rail passenger service throughout a large segment of the nation should be deemed to have been resolved by a process of procedural sleight-of-hand, rather than on their merits. (Pet. 118-119).[5]

B. The Case Does Not Present An Important Question of Federal Law

The case presented by the Petition is concerned with Amtrak's procedural maneuvering to prevent the Reorganization Court from considering the effect of the Rail Act upon the Arbitration Award. The Seventh Circuit, the Reorganization Court and the Third Circuit have all concluded, after receiving briefs and hearing oral arguments of the parties, that the Rail Act issue is one that can be raised in the Reorganization Court. Certainly, this is a sufficient expenditure of judicial effort upon the *res judicata* issue, thus making review by this Court unnecessary.

VII

CONCLUSION AND REQUEST FOR RELIEF

The decision of the Seventh Circuit holding that the Indiana Court was without jurisdiction by Declaratory Judgment or otherwise to interfere with the jurisdiction of the Reorganization Court and that the Declaratory Judgment was wrong on the merits was correct. No conflict between circuits or with the decisions of this Court exists

5. This holding of the Reorganization Court was affirmed by the Third Circuit (Appendix A to this Brief at A23-A24).

and further, no important federal question is presented by Amtrak's Petition. Accordingly, the Trustees respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Dated: August 10, 1977

VIII
CERTIFICATE OF SERVICE

I hereby certify that I have this day caused three copies of the foregoing Brief for Respondents, Trustees of the Property of Penn Central Transportation Company, Debtor, In Opposition to Petition for Writ of Certiorari to be hand delivered to the office of:

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Carl Helmetag, Jr.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2542

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY,
Debtor

National Railroad Passenger Corporation,
Appellant

(D.C. Bkcy. No. 70-347)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued April 1, 1977

Before GIBBONS, VAN DUSEN and GARTH, *Circuit Judges*

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OPINION OF THE COURT

(Filed July 25, 1977)

VAN DUSEN, *Circuit Judge.*

This is an appeal, taken pursuant to the Bankruptcy Act, 11 U.S.C. § 47, from Order 2569, dated October 1, 1976, of the United States District Court for the Eastern District of Pennsylvania (the Reorganization Court), entered in the Penn Central Railroad reorganization proceedings. Order 2569 [1] denied a petition of the National Rail Passenger Corporation (Amtrak) for an order "authorizing, instructing, and directing" the trustees of the Penn Central to carry out a March 24, 1976, judgment of the United States District Court, Southern District of Indiana [2]

1. Order 2569 in pertinent part provided:

"AND NOW, this 30th day of September, 1976, upon consideration of the 'Petition of National Rail Passenger Corporation for Order Authorizing, Instructing and Directing the Trustees to Carry out the Judgment of the U.S. District Court, Southern District of Indiana to Restore or Cause to be Restored Certain Rail Lines in Indiana' (Document No. 10440), and after hearing thereon, it is ORDERED:

"1. The Petition is DENIED.

"2. The Petitioner, National Rail Passenger Corporation ('Amtrak'), is enjoined from instituting or furthering any legal proceeding for the assertion or enforcement against the Trustees or the estate of the Debtor of any alleged obligation or liability for track maintenance or improvement, in any jurisdiction or before any tribunal except this Court (or, if appropriate, in the Special Court), or as otherwise ordered by this Court. Nothing in this Order shall be deemed to apply to the appeal now pending in the Circuit Court of Appeals of the Seventh Circuit, nor to any appeal from this or any other Order of this Court."

Matter of Penn Central Transportation Co., 422 F. Supp. 67, 74-75 (E.D. Pa. 1976) (hereinafter "the *Reorganization Court's Opinion*").

2. Order of Confirmation Concerning NAP Case No. 11; *In Re: Level of Rail Utility Final Decision and Award as to Penn Central* (S.D. Ind. Civil No. 1P76-76-C, March 24, 1976).

which confirmed an arbitration decision [3] that the trustees should restore or cause to be restored certain rail lines in Indiana so as to provide for the same level of passenger service which was in effect as of May 1, 1971. We vacate the first sentence of paragraph 2 of Order 2569 and affirm it in all other respects.

I. FACTS

Initially on this appeal, Amtrak's arguments relied on the *res judicata* effects of a June 25, 1976, declaratory judgment [4] of the Indiana district court which held that its

3. NAP Case No. 11; In re: Level of Rail Utility, Final Decision and Award as to Penn Central, dated February 3, 1976 (hereinafter "the Arbitration Award").

4. *National Railroad Passenger Corporation v. Blanchette*, Memorandum Order of June 25, 1976 (S.D. Ind., Civ. No. IP 76-274-C), *reversed and remanded, National Railroad Passenger Corporation v. Blanchette*, 551 F.2d 127 (7th Cir. 1977), petition for certiorari filed, 46 U.S.L.W. 3013 (July 19, 1977). The June 25 Order provided in pertinent part:

"The judgment upon the arbitration award of the National Arbitration Panel entered by this Court on March 24, 1976, is *res judicata* concerning and is a conclusive bar against any further legal claims which may be made by the Trustees that:

"(a) the award of the National Arbitration Panel and judgment of this Court entered thereon is invalid or non-enforceable because of the provisions of the Regional Rail Reorganization Act of 1973; or

"(b) the rehabilitation of the rail lines which are the subject of this controversy at the sole cost of the Trustees is unreasonable or inequitable in view of the April 1, 1976, transfer of these lines to ConRail; or

"(c) the judgment should not be carried out because of any facts, circumstances or legal defenses which could have been or ought to have been asserted during the confirmation proceedings as a ground for vacating the award under the provisions of Section 10 of the Federal Arbitration Act or for modifying or correcting this award under Section 11 of the Federal Arbitration Act, 9 U.S.C. §§ 10 and 11."

Id. at page 7 of slip opinion.

March 24, 1976, confirming order was a conclusive bar against any further claims by the trustees that the Rail Act rendered the arbitration award unenforcible. In this connection, Amtrak also argued that the Reorganization Court had no jurisdiction to take any action in this matter except to enforce the now confirmed arbitration award.[5] After the entry of the Reorganization Court's Order 2569 in October 1976 and the filing of briefs for the appeal in this Court but before oral argument here on April 1, 1977, a panel of the Seventh Circuit reversed the June 25th declaratory judgment of the Indiana district court. *See National Railroad Passenger Corporation v. Blanchette,* 551 F.2d 127 (7th Cir. 1977) (hereinafter cited as *Blanchette*). In reversing the district court, the Seventh Circuit held, *inter alia:*

> "[T]hat the Declaratory Judgment of the Indiana Court was an improper exercise of its limited jurisdiction and was wrong on the merits. Accordingly, the judgment of the Indiana Court is reversed. This case is remanded to the Indiana Court with directions to vacate its declaratory judgment.
>
> "The issues hereinabove discussed are within the exclusive jurisdiction of the Pennsylvania Reorganization Court and it may now proceed therewith."

Id. at 136. In our view the Seventh Circuit's decision either mooted or severely undermined most of Amtrak's contentions in its initial brief.[6] However, because certain

5. See, *e.g.*, National Railroad Passenger Corporation's Motion to Sever and Strike Trustees' Rail Act Assertions, dated August 27, 1976 (reproduced in appendix at 74a-77a).

> "Although Amtrak petitioned [the Reorganization Court] to enforce the arbitrators' award, as confirmed by the Indiana court, it is apparently the contention of Amtrak's counsel that the only issues which [the Reorganization Court had] the jurisdiction to decide relate to choices as to which of the Debtor's assets should be devoted to the contemplated track improvement. Amtrak seems to be contending that all other issues either have already been decided elsewhere, or cannot be decided because they should have been decided elsewhere."

Reorganization Court's Opinion, supra at 68-69.

It is evident from the transcript of the September 8, 1976, hearing before the Reorganization Court that the only issue presented by Amtrak to that Court was that the declaratory judgment of the Indiana district court precluded the trustees from raising or litigating any defense related to the passage of the Regional Rail Reorganization Act of 1973.

6. Amtrak framed the issues as follows at page 2 of their brief:

> "1. When the Trustees in a bankruptcy reorganization appear with the consent of their bankruptcy court in a confirmation proceeding in a coordinate federal district court to determine the validity of an arbitration award, is the bankruptcy court empowered to limit, by its own order, the scope of the judicial review of the award so judgment entered thereon does not have the effect prescribed by § 13 of the United States Arbitration Act, 9 U.S.C. § 13?
>
> "2. Can a court sitting in a § 77 reorganization by its own order reserve to itself powers to review collaterally the enforceability and legal validity of an arbitration award against the Trustees of the debtor when final judgment has been entered upon the award by a coordinate federal district court pursuant to the provisions of the United States Arbitration Act, 9 U.S.C. §§ 1-14.
>
> "3. Must a court sitting in a § 77 reorganization give *res judicata* effect to a judgment of a coordinate federal district court upon an arbitration award against the Trustees of the debtor when such judgment is presented to the bankruptcy court for satisfaction and enforcement?
>
> "4. Is a judgment entered by a United States District Court other than the reorganization court, declaring the rights and obligations established by a judgment confirming an arbitration under 9 U.S.C. § 13 and stating that the trustees of the debtor are estopped by judgment from asserting that the award is legally unenforceable under the Rail Act, binding upon the Trustees in subsequent reorganization proceedings?
>
> "5. Does an injunction issued by a § 77 reorganization court against 'any legal proceeding' by Amtrak to resolve disputes arising under a statutory contract with the Trustees by an arbitration process specifically agreed to by all railroads contracting with Amtrak under the Amtrak Act violate the statutory or constitutional rights of Amtrak or contravene the prohibitions of 28 U.S.C. § 959 or 11 U.S.C. § 205(j)?"

language in Part III [7] of the Reorganization Court's opin-

7. Part III provided:

"[8] The basic agreement between Amtrak and the Trustees required the Trustees to maintain the trackage at its May 1, 1971 level of utility for a period of 25 years. But on April 1, 1976, as mandated by the Rail Act and the final System Plan promulgated thereunder, the Trustees' ownership of the railroad and responsibilities for operating it became vested in ConRail. The suggestion that the Trustees nevertheless remain liable to maintain the property for all, or any part of, the remaining 20 years of the term of the agreement deserves serious consideration only if one assumes that Amtrak, unlike all of the thousands of other parties having legal relationships with the Penn Central, has been granted some kind of immunity from the impact of Congressional action. Needless to state, no such immunity has been conferred.

"[9] Congress plainly intended to eliminate the involvement of bankrupt estates and reorganization courts in the ownership and operation of the rail system in the northeastern part of the United States. By providing, in the Final System Plan approved by Congress, for the conveyance of ownership and operating responsibilities to ConRail as of April 1, 1976, Congress achieved that goal. The Final System Plan itself expressly deals with the question of ongoing maintenance and improvement of trackage to the level required by Amtrak (see Final System Plan Vol. 1, pp. 30, 43-44). To require the Trustees to plan for, finance, and carry out maintenance and improvements after the April 1 cutoff date would be clearly inconsistent with these provisions, as well as with the provisions of § 211(h) of the Rail Act (governing the transitional financial arrangements between ConRail and the Trustees) and the valuation process now under way in the Special Court.

"The contract between the Trustees and Amtrak makes it abundantly clear that the question of maintenance and improvement is inseparable from continued ownership. The Trustees were required to maintain their own railroad, not someone else's. They were required to use their own employees (because of the terms of existing collective bargaining agreements), not someone else's. The contract purports to be binding upon the successors and assigns of the Trustees, without regard to whether such successor or assignee did or did not assume the obligations of the contract. Whether this means that Amtrak is entitled to enforce these obligations as against ConRail is not for this Court to decide. Depending upon how that question is ultimately resolved, it may be that Amtrak might be able to establish that implementation of the Rail Act has deprived it of valuable rights, for which it is entitled to a

ion and order 2569 is ambiguous or might be read to have an effect *in futuro* far outstripping that justified by the hearings conducted, we asked that the parties respond to additional questions [8] and that each be covered in oral

7. (Cont'd.)

remedy; or ConRail might be able to establish that its assumption of these liabilities comes within the 'other benefits' aspect of the valuation proceedings in the Special Court. I express no view as to any of these matters.

"For the reasons thus far discussed, the relief sought by Amtrak in the present case cannot and will not be granted."

Reorganization Court's Opinion, supra at 73-74 (footnotes omitted). We note that § 211(h) was amended after the Reorganization Court's opinion and order in this case. Whether or not this amendment will affect the outcome of this case will be a matter for the Reorganization Court on remand. We express no view of the point at this time.

8. The four pertinent questions were as follows:

"1. Under Part III of the district court Memorandum and Order No. 2569 of September 30, 1976 (87a ff.), are all of the Penn Central trustees' obligations under the 1971 agreement now excused because of the operation of the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701 et seq. ('the Rail Act'), or are only the obligations under Section 4.2 (maintenance) of the contract excused?

"2. Does the above Memorandum and Order operate as a bar against (1) any action by Amtrak for damages for any breach of contract which may have occurred prior to April 1, 1976, or (2) any other remedy, such as restitution, which Amtrak may have?

"3. What is the significance of the citation in the above Memorandum Opinion to § 211(h) of the Railroad Revitalization Regulatory Reform Act of 1976, 45 U.S.C. § 801 ff.?

"4. Did Conrail become an indispensable party to this case upon the passage of the Regional Reorganization Rail Act in 1973?"

We note that in the briefs responding to the above questions the parties have taken diametrically opposed positions on each point. It is now evident that these require a fuller development on the record. However, we turn to ConRail's status as an indispensable party. ConRail has filed a memorandum in this case which indicates that it had specifically rejected the Basic Agreement of 1971 and had entered into a 1976 agreement with Amtrak whereby "The ConRail Rail Lines used in Amtrak's Intercity Rail

argument. Our concerns are essentially twofold: first, the language of order 2569 seemed to preclude further resort to the Arbitration panel should any further disputes arise that, otherwise, would have been within the purview of that forum's jurisdiction. Secondly, the contextual nexus

8. (Cont'd.)
Passenger Service . . . *shall be maintained by ConRail in no less than the condition in which such Rail Lines were conveyed to ConRail under the Rail Act.*" ConRail's position is that the "Bill of Sale and Assignment" conveying Penn Central's rail assets to ConRail specifically provided that ConRail was not to assume Penn Central's pre-conveyance maintenance obligations to Amtrak. For its authority, ConRail relies on Section 303(b)(2), 45 U.S.C. § 743 (b)(2) of the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701 *et seq.*, P.L. 93-236, January 2, 1974, 87 Stat. 986 (hereinafter the "Rail Act") which provides that the rail properties were conveyed to ConRail "free and clear of all liens and encumbrances." ConRail's contentions concerning its responsibilities on the 1971 Basic Agreement between Amtrak and Penn Central have never been subjected to judicial review and, at this point, they are entitled to no more weight than the contentions of any other litigant. Other sections of the Rail Act indicate that upon conveyance of the properties ConRail was to assume the responsibility for maintaining and upgrading lines used by Amtrak. See *e.g.*, 45 U.S.C. § 716(a)(7), 742(c), (d). The fundamental purpose of the 1971 Amtrak Act that an efficient and effective rail passenger service was needed in the Northeast and Midwest as a matter of national policy was never repealed or abandoned by the Congress when it enacted the 1973 Rail Act; if anything, the Rail Act demonstrates that this purpose was reiterated and in reiteration strengthened. *Compare* 45 U.S.C. § 501 *with* 45 U.S.C. § 701. In short, the merits of ConRail's views on its obligations to Amtrak are not as clear cut as ConRail urges. Finally, ConRail's obligations to mantain Amtrak's passenger routes as reflected in the Final System Plan are tenuous and without any statement of firm priorities; the ICC order of March 31, 1976, also filed in this case, goes no further; thus, Amtrak's needs may never be fulfilled and the Congressional purpose of 45 U.S.C. § 501 may be defeated if we allow this matter to remain as it now stands without a full adjudication. *But see* Part III as set forth in note 7, supra. Therefore, upon remand the Reorganization Court shall order the joinder of ConRail as an indispensable party in this action under Bankruptcy Rules 8-602(b) & 719. Joinder of ConRail may serve to eliminate those problems generating the Reorganization Court's concern that Penn Central might be compelled to complete its contractual obligations to Amtrak but be foreclosed from recovering their value in the Special Court.

of the order and Part III seemed to preclude Amtrak from ever asserting any claim for contractual breaches occurring during the preconveyance period (*i.e.* the period from May 1, 1971 to April 1, 1976).[9] Language of a subsequent opinion of the Reorganization Court has alleviated many of these concerns as will be discussed below (see pp. 14-16 *infra*). [This Appendix at A16-A19].

For the sake of clarity and to frame an essential perspective into this case, it is necessary that we outline the rather complex statutory and factual background of this case. We are indebted to Judge Hastings' analysis in the Seventh Circuit opinion.

In accordance with the Rail Passenger Service Act of 1970, 45 U.S.C. § 501, *et seq.*, Amtrak was authorized to

9. Amtrak understood the opinion and order in this manner and raised the point in its initial briefs. In their answering brief the Penn Central trustees asserted that any remedy for damages that Amtrak might otherwise have against Penn Central now had to be asserted against the United States as a Tucker Act claim. In Penn Central's brief responding to our question, see note 8, *supra*, the trustees conceded that Amtrak's damage claims could be pressed in the Reorganization Court, subject, however, to any defenses or offsets Penn Central might have; the Reorganization Court's latest opinion in regard to this matter takes a similar point of view.

Amtrak has conceded on this appeal that the conveyance of the Penn Central rail assets to ConRail on April 1, 1976, excused the trustees from the balance of their maintenance obligations on the contract; thus, we need not consider that point here. We note, however, that although Penn Central took the position on its brief that the conveyance was an eminent domain taking excusing its obligations to Amtrak, in its brief replying to our letter and at oral argument, its counsel nevertheless asserted that the conveyance did not vitiate the entire contract thereby suggesting that Amtrak continued to have unexecuted obligations under the agreement to Penn Central. In other words, Penn Central's position in regard to the effect of the conveyance on different portions of the contract seems to be somewhat inconsistent. In any event, the record in this case in regard to these contentions is not sufficiently developed for us to take a point of view on the matter at this time and it is unnecessary that we do so. However, if Penn Central feels that portions of the contract continue to create binding obligations between it and Amtrak, the precise boundaries of that contention are to be developed by the Reorganization Court on remand.

contract with each railroad undergoing reorganization and operating passenger trains in a basic system, for use by Amtrak of railroad tracks, facilities and services "on such terms and conditions as the parties may agree." See 45 U.S.C. § 562(a). Pursuant to this statutory authorization, Amtrak entered into The National Railroad Passenger Corporation agreement of April 16, 1971 (the "Basic Agreement"). The Basic Agreement's purpose was "to relieve the railroad of its entire responsibility for the provision of intercity rail passenger service" under "such terms and conditions as necessary to permit the Corporation [Amtrak] to undertake passenger service on a timely basis." 45 U.S.C. § 562(a). Article 6 of the Basic Agreement incorporated by reference the National Railroad Passenger Corporation Arbitration Agreement (the "Arbitration Agreement"). Essentially, the Arbitration Agreement established a system of adjusting *contract disputes* through resort to an arbitration panel, rather than through constant resort to the Reorganization Court.[10]

> "Under the terms of the Basic Agreement, Amtrak undertook to assume the intercity rail passenger responsibilities of the Trustees of Penn Central and

10. Language within the *Arbitration Award, supra,* is instructive on this point; it states:

> "Article Six of the Basic Agreement limits the authority of the Panel to 'the interpretation, application, or implementation of this Agreement,' and Section 4.5 of the Arbitration Agreement requires that the Panel 'be governed by the provisions and language of the applicable Basic Agreement or Agreements.' Accordingly, the Panel does not consider that it is the proper body to decide whether, or to what extent, the Regional Rail Reorganization Act of 1973 or the Final System Plan thereunder may affect the carrying out of this award."

Arbitration Award, supra at 11 (reproduced at 35a, appendix). It is this language—explicitly limiting the scope of the matters adjudicated before the arbitration panel—that is at the very heart of this suit.

> all other contracting railroads, and Penn Central undertook to render certain services to Amtrak and to maintain its rail lines used by Amtrak at an agreed upon 'level of utility.'
>
> "Under Article Six of the Basic Agreement any 'claim or controversy' between Amtrak and Penn Central was to be resolved by binding arbitration in accordance with the provisions of The National Railroad Passenger Corporation Arbitration Agreement separately contracted to by the parties on April 16, 1971. Referred to by the parties as the 'Arbitration Agreement,' Section 4.2 provides:
>
> > '• • • [A]ny arbitration award hereunder made by a *majority* of the members of any Arbitration Panel shall be binding upon the parties thereto. Any arbitration award hereunder shall declare the rights of the parties thereto and *may make awards of money, or enjoin or otherwise operate in such a way as to require specific performance by a party of any act or obligation.*' (Emphasis added.)
>
> Section 4.3 of the Arbitration Agreement further provides:
>
> > 'Judgment may be entered upon any arbitration award hereunder • • • in any United States District Court.'"
>
> *Blanchette, supra* at 130.
>
> "In authorizing the Trustees of Penn Central to enter into the Basic Agreement with Amtrak, the Reorganization Court in Order No. 238, in pertinent parts, stated:

'1. The Trustees are authorized to execute a contract with Amtrak in substantially the form submitted to the Court at the hearing, PROVIDED, however, ° ° ° (b) that whenever any matter is resolved by arbitration pursuant to the Main Agreement or the Arbitration Agreement, the decision shall be submitted to this court for review and approval before becoming finally binding upon the Trustees or the Debtor, during the pendency of these reorganization proceedings.

° ° ° °

'4. The Court reserves jurisdiction over said contract for the purpose of directing such actions and granting such further relief as may be necessary to protect the interests of the Debtor's Estate.'" [11]

Id. at 131-32.

11. The Reorganization Court's reasons for the entry of this order and its view of the order's effects is outlined in the Court's opinion. See *Reorganization Court's Opinion, supra* at 70-72. It is clear that Amtrak representatives were fully aware of the order *prior* to the time of execution of the Basic Agreement. In view of *Blanchette, supra,* it is unnecessary that we extensively analyze Amtrak's contention on this appeal that Order 238 was improper; it would appear that the Reorganization Court's analysis is substantially correct.

"Language from Amtrak's memorandum, as it appears in the record in the Reorganization Court, reads:

'any judgment entered by the Indianapolis District Court upon Amtrak's Petition to Confirm will not serve to make the award of the National Arbitration Panel finally binding upon the Trustees. To become finally binding, execution on the judgment would be necessary. Yet execution in any court other than this Reorganization Court would so manifestly interfere with the Court's exclusive jurisdiction to control the administration of the estate that it would be impossible to support in law or fact. Therefore, in order for Amtrak to make the award *finally binding* upon the Trustees, the entire matter will eventually have

"A dispute arose between Amtrak and Penn Central concerning the 'level of utility' of about 360 miles of certain rail lines of Penn Central connecting Kankakee, Illinois, with Louisville, Kentucky, and Cincinnati, Ohio, via Indianapolis, Indiana, under the Basic Agreement of 1971. Amtrak's claim that Penn Central had defaulted in its obligation to maintain the track was duly submitted to the National Arbitration Panel.

"After the parties submitted extensive written memoranda and oral testimony was heard, the arbitration was interrupted by an 'Emergency Order' of the Federal Railroad Administration on August 1, 1974. This emergency order terminated Amtrak's service on the above-mentioned Penn Central line because the track had been found to be 'in an unsafe condition,' creating 'an emergency situation involving a hazard of death or injury to persons affected by the use thereof.'

"Without objection from Penn Central and in accordance with its rules, the Panel began additional hearings, accepted a revised request for an award from Amtrak, and received additional evidence on September 11, September 24, September 29 and December 16, 1975, and January 20, 1976. Thereafter, on February 3, 1976, the National Arbitration Panel issued a written award in NAP Case No. 11, *In re: Level of Utility,* with the following declarations and awards:

11. (Cont'd.)

to be submitted in the bankruptcy proceedings ° ° ° The mere fact that the arbitration claim has been reduced to a judgment will not prevent this Court from making an inquiry since the merger of a claim into a judgment does not change its nature as far as provability is concerned.'"

Blanchette, supra at 132.

"First, the Panel declared that Amtrak had a contract right to have the Penn Central rail lines connecting Kankakee with Cincinnati and with Louisville via Indianapolis kept 'at no less than the level of utility' which existed on May 1, 1971.

"*Second, the Trustees of Penn Central had defaulted in keeping this bargain.*[12]

"Third, the Trustees were ordered to 'cause' the restoration of these lines to their proper condition by January 1, 1978, in accordance with a 'Panel Program,' which provided, *inter alia,* for a detailed work schedule to be submitted to Amtrak within ninety days of this award.

"The estimates of the cost of these repairs ranged from 22 million dollars, based upon independent evaluation, to 11 million dollars, estimated by Penn Central using its own employees. Costs were estimated in terms of October 1975. The Panel's award further provided that Penn Central would bear the entire financial burden of the repairs."

12. In other words, the breach considered by the Arbitration Panel occurred during the preconveyance period, May 1, 1971, to April 1, 1976. Furthermore, the fact that arbitration was initiated on January 11, 1973, suggests that a significant percentage of the deterioration occurred prior to passage of the Rail Act on January 2, 1974.

Reduced to its essentials, the trustees' argument is simply that the Rail Act excused their performance not only for preconveyance breaches of the Basic Agreement occurring after passage of the Act but also for those occurring prior to January 2, 1974. There may be grounds, as the trustees assert, that will excuse their performance after passage of the Act, but it is more difficult to see how their asserted Rail Act defense applies to the pre-passage breach. On the other hand, the record before the court is not sufficiently developed for us to determine the Arbitration Panel's position on this point or even to ascertain if evidence was introduced at the arbitration proceeding that would delineate the scope of the pre-passage breach. Also, the trustees' position on this point is not clear. See also discussion in note 15, *infra.* Accordingly, we express no view of the outcome of the problems pointed out in this note other than to indicate that it should be considered on remand. See notes 9 above and 15 below.

Id. at 130-31 (emphasis supplied) (footnote omitted).

"[T]he Arbitration Panel held that it was without jurisdiction to decide the [issue of whether the passage of the Rail Act and the pending conveyance of Penn Central properties to ConRail would operate to excuse the performance of Penn Central's contractual obligations to Amtrak]. The issue was not raised before the Indiana Court. Yet, Amtrak urged and the Indiana Court held [in its declaratory judgment of June 25, 1976] that the Trustees could not raise the issue of the transfer of the subject lines to ConRail."

Id. at 136.

"On February 4, 1976, pursuant to 9 U.S.C. § 9, United States Arbitration Act, and Section 4.3 of the Arbitration Agreement, *supra,* Amtrak petitioned the United States District Court for the Southern District of Indiana, Indianapolis Division, for confirmation of the arbitration award. However, on February 17, 1976, Penn Central petitioned the Reorganization Court in the Eastern District of Pennsylvania for an order requiring Amtrak to show cause 'why it should not be required ° ° ° to comply with the provisions of Order No. 238 and, pending the filing of said petition, why it should not be enjoined from proceeding further in the [Confirmation Proceedings]."

Id. at 131.

"The Reorganization Court, however, never ruled on Penn Central's February 17, 1976, petition to show cause, because the Trustees of Penn Central subse-

quently consented to the entry of a judgment in the Indiana Court. *The consent of the Trustees, and by implication that of the Reorganization Court, was induced by the assurances of counsel for Amtrak that it was only attempting to liquidate its claim in the Indiana court, and that Amtrak was well aware of and, in fact, accepted the primary jurisdiction of the Reorganization Court.*"

Id. at 132 (emphasis supplied).

"Thereafter, the Trustees consented to the entry of judgment in the Confirmation Proceedings in Indiana, based upon the above assertions in the Reorganization Court, that the Indiana Court would review the arbitration proceedings 'to see that the award was a proper award and that the arbitrators acted honestly and did not exceed their powers.' Thereafter, the Indiana Court entered an Order of Confirmation on March 24, 1976.

"On April 9, 1976, Amtrak petitioned the Reorganization Court for enforcement of the now confirmed Arbitration Award. Penn Central, thereafter, filed an answer to the petition for enforcement, asserting that the award could not be enforced against Penn Central because the rail tracks in question had been conveyed to ConRail pursuant to the Rail Act, and, therefore, Penn Central's obligation to restore the tracks was terminated. Amtrak secured an indefinite postponement of its petition in the Reorganization Court, returned to the Indiana Court and filed its . . . declaratory judgment action in Indiana." [13]

Id.

Following oral argument in this court, on April 22, 1977, the Reorganization Court entered Memorandum and

13. See note 11, *supra*.

Order Nos. 2921 and 2922. Generally, the Memorandum discussed and the Orders dealt with certain aspects of the Penn Central trustees' Proposed Plan of Reorganization not at issue in this appeal; however, as Amtrak objected to certain of the trustees' proposals, the Reorganization Court had occasion to enter into the following discussion which has particular relevance to this case:

"*Amtrak's Objections*

. . .

"Amtrak is not a direct provider of passenger service, but rather contracts with operating rail carriers for them to provide Amtrak's passenger service. The Debtor performed such services for Amtrak from May of 1971 until the conveyance of the Debtor's rail property to ConRail on April 1, 1976. Amtrak has been pursuing a rather complex litigation strategy to assert certain claims allegedly arising from the Trustees' failure to meet their preconveyance contractual obligations. As part of this effort, Amtrak presented to this Court a petition for enforcement of an award made by an arbitration panel, which determined that, during the period before conveyance of the rail system to ConRail, the Trustees had failed to maintain certain passenger track at the level of utility required by the contract between the Trustees and Amtrak. The relief sought was in the nature of specific performance: an order requiring the Trustees to perform certain engineering services and to plan for, and thereafter carry out, certain large-scale track restoration. I denied Amtrak's request because the conveyance of the railroad to ConRail pursuant to the RRRA rendered performance of track maintenance by the Trustees a legal and practical impossibility.

See In re Penn Central Trans. Co. (Petition of Amtrak to Enforce Arbitration Award), 422 F. Supp. 67 (E.D. Pa. 1976).

"Although I had no occasion at that time to decide whether Amtrak had a claim for damages, I did point to some possible obstacles to the successful assertion of any such claim: Before the arbitrators, Amtrak expressly disavowed any claim for damages; the causal relationship between the level of track maintenance and Amtrak's revenues might be difficult to establish; and the amount of money due the estate from Amtrak under the agreement would have been greater if the Trustees had spent the amount of money for track maintenance which Amtrak contended was necessary. *By reiterating these potential infirmities, I do not mean to preclude Amtrak from asserting any claim it may feel is justified.* The Third Circuit presently has under advisement Amtrak's appeal in that matter.

"It would be difficult to conclude that Amtrak has standing to object to the tax compromise if the only basis for such objection is its alleged right to have the Trustees do heavy track work on ConRail's railroad. *However, Amtrak now seems to be asserting that it has administration claims against the estate of approximately $150 to $170 million in contract damages* (Docs. Nos. 12096, 12694).[15] *While the validity and amount of these claims has not yet been established,* the reasonable course at this point is to accord Amtrak standing as an administrative claimant. *Cf.* Rule 8-306(a).

. . . Amtrak's claims are not even liquidated. . . . If and when Amtrak establishes that it has an administration claim, adequate provision can be made to satisfy its claim.

"15. *The claim apparently includes the specific segment of rail line involved in Amtrak's prior petition, as well as additional instances of alleged failure on the part of the Trustees to maintain the quality of the track and roadbed.*"

Id. at pages 20-22 of slip opinion (emphasis supplied).

II. The Scope of the Reorganization Court's Order 2569

The issue yet to be decided is whether the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701 *et seq.*, as amended, and the consequent conveyance of certain of Penn Central's rail assets to ConRail excused the Penn Central trustees from performance of work or damages claims related to Penn Central's pre-conveyance contractual track maintenance obligations to Amtrak as required under the Basic Agreement. At this point in the litigation, the Reorganization Court has not definitely granted or denied any claim made by Amtrak related to the alleged pre-conveyance contractual breaches of the Penn Central because the Arbitration Panel never decided whether the conveyance to ConRail relieved the trustees of liability for money damages and did not consider the effects of the Rail Act on the performance of the obligations. In short, the Rail Act issue has never been litigated in any forum.

In developing the record below, Amtrak relied almost exclusively on the *res judicata* effect of the Indiana district court's declaratory judgment without ever reaching the substantive merits of the Rail Act's effects; this position has been vitiated by the reversal in *Blanchette, supra.*[14]

14. The Seventh Circuit's decision in *Blanchette, supra,* now represents the law of the case as far as the June 25 declaratory judgment is concerned. See 1B Moore's Federal Practice ¶ 0.404 *et seq.* (2d ed.). Therefore, even if we disagreed with the Seventh Circuit, it would be anomalous if we were to reach a result on this appeal which would have the practical effect of reinstating the

Under the Indiana district court's confirmation order of March 24, 1976, however, Amtrak has established, at least, a case of preconveyance contractual breaches by the Penn Central trustees. We have noted that the record is substantially undeveloped with regard to the Rail Act issue and to the effect of the Final System plan in relieving the Penn Central trustees of liability, as an expense of administration, for damages for the breach of contract found by the Arbitration Panel and "confirmed" by the Indiana district court. We express no opinion on these issues at this time. See, *e.g.*, note 12 above. It is also clear that the determination of the amount of damages is still to be decided. See *Arbitration Award* at 32a-33a.

The language of Order 2569 would be too sweeping if we did not have the Reorganization Court's Memorandum and Order Nos. 2921-2 of April 22, 1977. However, in light of the wording used there, it is clear that Amtrak has the right to request enforcement of the arbitration award by the Reorganization Court or to establish its claims to damages as a result of the pre-conveyance

14. (Cont'd.)
declaratory judgment of the Indiana district court. See *Insurance Group Committee v. Denver & Rio Grande Western R.R.*, 329 U.S. 607, 612 (1947).

At oral argument Amtrak's counsel requested that this court withhold an opinion on this appeal until Amtrak had filed a petition with the Supreme Court for certiorari in *Blanchette, supra*, and a ruling on that petition had been obtained. Amtrak was to inform the court of the petition's filing as of May 16, 1977, and to advise us of further results. We received no information and, upon directing the Clerk to contact counsel, information was developed that Amtrak has asked the Supreme Court to extend the time to file the petition until July 15, 1977. An order staying the issuance of the Seventh Circuit's mandate until determination of such petition has also been issued by the Supreme Court of the United States (see Nos. A888 and A889, *National Railroad Passenger Corp. v. Blanchette, et al.*, Orders of April 28, 1977). Shifts of position by both parties have not been an unusual circumstance in this case.

breaches.[15] Although we believe the language of the Reorganization Court's order in this case contemplated no more than that enforcement of the *Arbitration Award, supra,* is now to be reviewed by the Reorganization Court in the light of any defenses which the trustees may raise, we have concluded that the language of the first sentence of paragraph 2 of Order 2569 is too sweeping and will be vacated.[16]

We agree with Judge Hastings' holding that "the Indiana Court was without jurisdiction by declaratory judgment, or other judicial means, to circumscribe the jurisdiction of the Pennsylvania Reorganization Court as

15. *Cf. In the Matter of the Valuation Proceedings Under §§ 303(c) and 306 of the Regional Rail Reorganization Act,* (Special Court, Misc. No. 76-1, April 19, 1977). Although specific performance of the trustees' maintenance responsibility would appear to have been unenforceable after April 1, 1976, financial arrangements could conceivably be made by the trustees to carry out the terms of their undertaking concerning which the *Arbitration Award* found they were in default prior to April 1, 1976. See pages 5-7 [This Appendix at A5-A8] above and this clause:

> "*Section 4.2. Maintenance of Rail Lines.*
>
> "The Rail Lines of Railroad used in NRPC's Intercity Rail Passenger Service pursuant either to Article Three or Article Four hereof shall be maintained by Railroad at not less than the level of utility existing on the date of the beginning of such use."

Under these circumstances, the Reorganization Court could hardly say that no relief would ever be available from the trustees. These considerations depend first on a precise delineation of Amtrak's property interests under the Basic Agreement and a careful, theoretical analysis of the Rail Act and the effects of the 1976 conveyance. We think it best to defer consideration of this group of contentions until we have a clearer statement of just what Amtrak claims and what the trustees' and ConRail's responses will be.

In any event, Amtrak would not have a right to any of the funds in the debtor's estate in advance of claims entitled to a higher priority under the applicable statutory provisions governing distribution.

16. This sentence would preclude future arbitration under the Arbitration Agreement, even with respect to matters not involved in the *Arbitration Award*.

to the enforcement of an arbitration award which was subsequently confirmed by the Indiana Court, and we now so hold." *Blanchette, supra* at 135.

For the reasons stated, the first sentence of paragraph 2 of Order 2569 will be vacated and that order will be affirmed in all other respects, with directions to the court, on remand, to join ConRail under Rule 719, if this has not already been done (see footnote 8 at pages 6-7 [This Appendix at A7-A8] above). That Court may now proceed to the question of any enforcement of the *Arbitration Award* or the claim on which it is based, taking into consideration any defenses that may be raised by the trustees.

To the Clerk:

Please file the foregoing opinion.

Circuit Judge

UNITED STATES COURT OF APPEALS
For the Third Circuit

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No. 76-2542

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In the Matter of
PENN CENTRAL TRANSPORTATION COMPANY,
Debtor

National Railroad Passenger Corporation,
Appellant

(D.C. Bkcy. No. 70-347)

On Appeal From the United States District Court
for the Eastern District of Pennsylvania

Present: Van Dusen, Gibbons and Garth, *Circuit Judges*

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on April 1, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered September 30, 1976, be, and the same is hereby vacated as to the first sentence of paragraph 2 of Order 2569 and affirmed in all other respects, with directions that the district court, on remand, join ConRail under Rule 719, if this has not already been done and proceed to the question of any enforcement of the

Arbitration Award or the claim on which it is based taking into consideration any defenses that may be raised by the trustees, in accordance with the opinion of this Court.

ATTEST:

THOMAS F. QUINN
Clerk

July 25, 1977